DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage	)	MM Docket No. 92-265

RECEIVED
JAN 25 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Introduction and Summary

These comments are submitted by the National Private Cable Association, MaxTel Associates Limited Partnership, MSE Cable Systems and Pacific Cablevision.

The National Private Cable Association ("NPCA") is the principal trade association for the private cable, or satellite master antenna television ("SMATV"), industry whose members provide multichannel video programming services via wired or wireless technology to residents of apartment complexes, condominiums, cooperatives, manufactured home parks, planned unit developments, hotels, hospitals, nursing homes, educational institutions, and other multi-dwelling facilities. The private cable industry serves approximately three million subscribers nationwide and typically represents the only multichannel video services competition to traditional franchised cable operators in their area.

MaxTel Associates Limited Partnership ("MaxTel") is the largest private cable operator in the nation, with approximately 40,000 subscribers. Pacific Cablevision ("Pacific") and MSE Cable

No. of Copies rec'd 2+5
List A B C D E

Systems ("MSE") operate private cable systems serving approximately 15,000 and 10,000 subscribers, respectively.[1]

NPCA recommends that the Commission adopt rules that would require cable programmers in whom a franchised cable operator has an attributable interest to adopt rate cards containing all of the terms and conditions on which programming would be offered to any multichannel video programming distributor seeking carriage. The anticompetitive purpose and effect of discriminatory and exclusive contracts is so great as to require of a presumption of their invalidity, unless the discrimination is premised upon legitimate factors such as system size. Even then, discrimination must be without regard to the affiliation or franchised status of the video distributor.

NPCA strongly recommends that the Commission ban subdistribution agreements between affiliated programmers and franchised operators. Such agreements are routinely used by franchised operators to prohibit competing video distributors from making popular programming available to their consumers, or to exact unreasonable agreements from the competing distributors which bear no relation to the subdistribution process itself.

To a large extent, the proposals advanced by the Commission would preserve the status quo by placing to great a burden on the aggrieved competitors to the franchised cable industry. Congress intended to rectify the competitive imbalance caused by the undue

[1] NPCA and the other commenters will be referenced to collectively as "NPCA".

concentration of power in the industry. This can be accomplished only if the parties whose conduct created the need for regulatory intervention, i.e., the members of the integrated cable industry, are required to prove the necessity of the exclusive and discriminatory arrangements which Congress has sought to discourage.

Exclusive and Discriminatory Programming Agreements Have The Purpose And Effect Of Diminishing Competition In the Multichannel Video Distribution Marketplace

As private cable operators, MaxTel, Pacific, MSE Cable and the other members of NPCA are all too familiar with the anticompetitive efforts of the franchised cable industry. Since passage of the Cable Communications Policy Act of 1984 ("1984 Act"), the franchised cable industry has tightened its grip on the multichannel video distribution market. As Congress found in passing the bill which gave rise to this rulemaking, most franchised systems operate without any competition from other multichannel video program distributors ("MVPD's"). Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Act"), § 2(a)(2). A relatively small number of multiple system operators ("MSO's") dominate the "highly concentrated" franchised industry. 1992 Act,

§ 2(a)(4). Their financial and political might has thwarted the competitive efforts of others.

Vertical integration between cable system operators and programmers has hampered competition in the multichannel video industry. 1992 Act, § 2(a)(5). Many MSO's have acquired substantial ownership interests in cable program networks. As the Notice states, 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators. Notice, para. 2. Programmers who are affiliated with cable systems regularly discriminate against non-affiliated MVPD's in the pricing of their programming.

However, discrimination is not always based simply on whether the MVPD is affiliated with the programmer; rather, the discrimination is often based on the non-franchised status of the unaffiliated MVPD. In other words, a programmer is apt to quote the same rate to an affiliated franchised cable operator in Phoenix as to an unaffiliated franchised cable operator in Philadelphia. The discrimination arises when the unaffiliated operator is also a non-franchised operator, e.g., a SMATV operator.

There is a simple explanation for the distinction drawn by affiliated programmers between franchised and non-franchised systems. Franchised cable systems rarely engage in head-to-head competition in a single market. Overbuilds affect less than one percent of franchised cable systems. S. Rep. No. 102-92, 102d Cong., 1st Sess. 13 (1991). Thus, in any particular community, competition to the franchised operator comes from SMATV systems operating in that community, not from another franchised system.

In an effort to squelch the competition that SMATV provides, programmers who are affiliated with the franchised industry impose discriminatory rates on SMATV operators, or withhold programming from them altogether.[2/] This makes SMATV systems less competitive and furthers the franchised industry's goal of a single MVPD in each market. That MVPD is, of course, a franchised cable operator. Frequently, Programmer A will discriminate against a SMATV operator in a particular market, even though the local franchised operator who will benefit is affiliated with Programmer B. Programmer B then returns the favor by discriminating against a SMATV operator serving customers in a market dominated by a franchised operator affiliated with Programmer A. In this manner, the programmers and cable systems who make up the vertically integrated cable industry further their collective goal of one MVPD to a market. The markets are then divided up among the affiliated cable operators, predominantly the larger MSO's. Section 628 of the 1992 Act attempts to eliminate

---

[2/] Non-affiliated programmers also discriminate against non-franchised operators, presumably to please the MSO's upon whom the programmers rely for widespread distribution of their programming service. Section 628 reaches only those satellite cable programming vendors who are affiliated "in which a cable operator has an attributable interest . . . " Section 628(b). However, in response to fn. 18 of the Notice, that section does apply to <u>all</u> cable operators (as well as all satellite broadcast programming vendors) since the "attributable interest" language is used only in conjunction with satellite cable programming vendors. For these purposes, NPCA recommends use of the broadcast ownership rules regarding attributable interests.

the discriminatory and exclusive arrangements which are aimed at producing these anticompetitive results.

There are endless examples of the abuses practiced by the franchised cable and affiliated programmer industries. In one instance, a landlord asked MaxTel to add SportsChannel Chicago ("SportsChannel"), a regional sports cable programmer, to the SMATV system operated by MaxTel at the landlord's apartment complex, known as Tanglewood, in Arlington Heights, Illinois. SportsChannel initially refused to act on MaxTel's requests for the programming, and then admitted that its reluctance to respond was directly related to the fact that Tele-Communications, Inc. ("TCI") had acquired a 25% equity interest in SportsChannel. TCI also owns the franchised cable operator in Arlington Heights who would be able to serve Tanglewood if MaxTel could not. In fact, TCI is the largest MSO in the nation with approximately nine million subscribers. Television & Cable Factbook, Vol. No. 60, Part 1, p. D-1926-27 (1992) ("Factbook"). Not surprisingly, before TCI purchased an interest in SportsChannel, MaxTel had been able to obtain the rights to SportsChannel at two other apartment complexes in the Chicago area without any problems.

Despite these prior sells to MaxTel, SportsChannel notified MaxTel that it would have to purchase retransmission rights at a rate of $1.15 per subscriber from the local TCI cable operator, who had a right of first refusal, rather than directly from SportsChannel. Yet, upon request by MaxTel, TCI quoted a rate of $1.75 per subscriber. MaxTel questioned TCI regarding this difference, but TCI refused to lower the rate. MaxTel complained to SportsChannel, who stated that it might be able to sell directly to MaxTel. However, despite daily inquiries by MaxTel, SportsChannel refused to act, again acknowledging that the problem was caused by the fact that TCI was a part owner of SportsChannel and that MaxTel was in competition with the local TCI cable operator.

After more than three months of this stonewalling, and with an irate landlord and tenants demanding SportsChannel, SportsChannel still had not responded to MaxTel's repeated requests. Finally, the landlord signed a contract with TCI for the provision of cable service, including SportsChannel. MaxTel was not immediately informed of the contract between TCI and the landlord. Curiously, once its affiliate TCI obtained the contractual right to serve the apartment complex, SportsChannel all of a sudden authorized the carriage of its signal by MaxTel. Immediately after that authorization, and without any notice to MaxTel, TCI and the landlord began disabling MaxTel's system so that TCI could move in. Thereafter, the landlord notified MaxTel that it had terminated the cable agreement between them and that MaxTel would be replaced by TCI, on the primary grounds that MaxTel had failed to add the programming of TCI's affiliate, SportsChannel.

In another instance, MaxTel sought to add the programming of TNT to a private system it operates at an apartment complex in Virginia Beach, Virginia. TNT is owned in part by TCI. Factbook, Part I, pp. D-1926-28. TNT advised MaxTel that it would have to purchase the programming from Cox Cable, the local franchised operator, to whom TNT had granted exclusive rights, including the right to subdistribute the programming to other MVPD's. Cox Cable, like TCI, is a large MSO with programming interests.[3] Cox Cable refused MaxTel's request. Thereafter, Cox Cable encouraged the landlord of the complex MaxTel was serving to sue MaxTel for breach of its cable agreement, in part due to its failure to provide TNT, so that Cox could have access to the property. Moreover, Cox Cable indemnified the landlord against the costs of the suit.

In theory, there may be justifications for exclusive contracts in some contexts. As the above examples demonstrate, however, in practice exclusivity is obtained not as a natural marketplace phenomenon, but rather as part of a concerted effort, including the use of contrived lawsuits, to foment unrest between SMATV operators and their clients and, ultimately, to drive the SMATV operators out of business.

Pacific Cablevision has encountered similar abuses. Pacific sought to obtain retransmission rights to TNT and Prime Ticket, a regional sports programmer owned in part by franchised operator Bill Daniels,[4] at a 106-unit apartment complex in Anaheim, California. Both TNT and Prime Ticket had granted first refusal rights to Multi-Vision, the local franchised operator. After several months of delay, Multi-Vision agreed to grant

---

[3] See Factbook, Part I, p. D-1879; Part II, p. F-4.

[4] See Factbook, Part I, P. D-1880.

retransmission rights at a per subscriber rate, but only on the condition that Pacific guarantee <u>100%</u> penetration at the apartment complex. Since the average penetration rate nationwide is approximately 60%, the offer to Pacific was akin to extortion. Indeed, in the midst of the discussions regarding the possible addition of TNT and Prime Ticket to this particular system, Multi-Vision offered to purchase the system from Pacific, stating that Pacific had no choice but to sell because it could not survive without the programming of TNT and Prime Ticket, which Multi-Vision was, in essence, withholding. Thus, Multi-Vision used its monopoly control over TNT and Prime Ticket in an attempt to drive Pacific out of the market altogether. Subsequently, Pacific sought to deal directly with TNT and Prime Ticket, both of whom refused to license Pacific, because of the "offer" made by Multi-Vision, an offer that was illusory given the requirement that Pacific guarantee 100% penetration.

To obtain the programming of TNT and Prime Ticket for a property in Orange County, California, Pacific was required to deal with Comcast, the local franchised operator. Comcast agreed to redistribute TNT and Prime Ticket to Pacific only as part of a package that included HBO and Showtime[5/], and which included an escalating minimum penetration guarantee. Under the terms of the coerced agreement, Pacific now pays a total of $26.95 <u>per subscriber</u> for HBO and Showtime, more than twice what it is

---

[5/] HBO is affiliated with MSO Time Warner Communications and Showtime is affiliated with TCI and Viacom International.

required to pay when it can buy those services direct from the programmers or even through a group purchaser of programming. Pacific pays an additional $4.00 per subscriber for TNT and Prime Ticket, approximately twice what it pays at other properties. Pacific agreed to this arrangement solely as a means to obtain the rights to TNT and Prime Ticket, which were deemed essential to the viability of Pacific's system. If Comcast eventually succeeds at making it too expensive for Pacific to operate a viable SMATV service, the residents of Orange County will have one less competitor to Comcast.

As this last example shows, when private operators are able to obtain service from affiliated programmers, the programming is offered at higher rates than those given to franchised operators. As an example, for franchised systems with as few as 79 subscribers MaxTel obtains the programming of TNT for $0.42 per subscriber, while paying $0.52 per subscriber for the same programming at properties that are several times larger. Similarly, Cable News Network[6/] charges MaxTel up to $0.45 per subscriber at its SMATV systems, and as little as $0.28 at its franchised systems. Other SMATV operators routinely face similar price differentials.[7/]

[6/] Cable News Network is owned by Turner Broadcasting System which is owned in part by TCI. Factbook, Part I, pp. D-1928-29.

[7/] Traditionally, the affiliated programmers have claimed that there is more paperwork and expense in serving smaller, private systems than the larger franchised systems, and that therefore higher rates are justified. Yet if system size were the true basis for the discriminatory treatment, the programmer would have a (continued...)

The ultimate victims of discriminatory rates and exclusive program arrangements are the consumers. If the SMATV operator manages to survive despite these anticompetitive tactics, its customers are either forced to pay higher rates for certain programming or to do without it at all. As shown above, these discriminatory arrangements are often simply one aspect of a multi-faceted attack on the SMATV operator for daring to compete with the entrenched franchised operator. The intent of the affiliated programmers and the franchised industry is to diminish competition by driving private operators out of the market and discouraging would-be entrants from investing in the MVPD industry. Because the proferred justifications for discriminatory arrangements are simply devices to shield the true anticompetitive intent, the Commission should adopt rules that will insure equal treatment of all MVPD's.

The Commission Should Adopt A Rate Card Approach
That Insures Equal Treatment Of All MVPD'S
Regardless Of Affiliation Or Franchise Status

Congress intended to curb abuses such as the ones described above by enacting § 628 of the 1992 Act. That section

---

[7](...continued)
series of flat rates tied directly to the number of subscribers, with those rates applied without regard to the franchised or non-franchised status of the MVPD. Such is not the case. MaxTel pays lower rates for programming for franchised systems that have fewer subscribers than some of its private systems for which it pays higher rates. The discrimination is based on franchised versus non-franchised, not system size. Moreover, CNN and MTV have a single account set up for all of MaxTel's systems. MaxTel's subscriber base of 40,000 is considerably greater than a larger number of "single account" franchised systems which receive the lower franchised rate.

does not simply instruct the Commission to conduct a factual examination of the programming distribution problem, or to act as a mere sounding board to whom individual MVPD's can bring their complaints regarding these practices to be resolved on a case-by-case basis. Rather, Congress is relying on, and directing, the Commission to eliminate programming abuses on an industry-wide scale. 1992 Act, § 628(a).

Unfortunately, in its Notice the Commission seems dubious about the wisdom of Congress' judgment, despite having itself reported to Congress in 1990 regarding the need to restrict discriminatory and exclusive programming agreements. Competition, Rate Dereregulation and the Commission's Policies Relating to the Provision of Cable Television Service,, 5 FCC Rcd 4962 (1990). In rectifying the ills identified by Congress, the Commission's primary objective appears to be the conservation of agency resources.[8] NPCA recognizes the burden that the 1992 Act represents for the Commission, given the number of required rulemakings on top of the Commission's regular pressing agenda. However, the need to conserve resources does not justify the adoption of program distribution rules that are so cumbersome as to

---

[8] For example, one of the options identified by the Commission to combat price discrimination is to establish "a reasonable region of price differentials . . . . within which we would rebuttably presume that a disparity in price is not discriminatory." Notice, para. 20. The Notice then adds that "a sufficiently broad region or allowance might reduce the administrative burden in resolving complaints." Id. Following this logic, the wisest choice would be to permit any price differentials that a programmer is able to get away with, thus reducing the administrative burden by prohibiting complaints altogether.

discourage aggrieved MVPD's from obtaining the relief which Congress intended to provide them.

Since it is the anticompetitive practices of affiliated programmers and franchised operators which Congress has sought to stifle, they are the parties who should shoulder the burden of justifying exclusive and discriminatory contracts. Placing the burden on non-affiliated MVPD's to prove the unreasonableness of such arrangements on a case-by-case basis assures that such anti-consumer arrangements will remain a part of the video marketplace for a long time to come. First, the disparity in size and wealth between the franchised industry and their affiliates, on the one hand, and the alternative MVPD's, on the other, already stacks the deck in favor of the status quo. In the 1992 Act, Congress recognized the barriers to entry posed by the highly concentrated nature of the vertically integrated cable industry. 1992 Act, § 2(a)(4). Those barriers simply become higher if individual MVPD's are required to challenge discriminatory arrangements on a case-by-case or per local market basis.

Second, the affiliated programmers and cable operators will not voluntarily disclose information regarding pricing, costs, volume discounts, and other contract terms to alternative MVPD's. In litigation arising out of cases such as those described above, the franchised operators and affiliated programmers fight tenaciously to preserve the confidentiality of such information. Since the affiliated entities have access to all of the relevant information, the Commission should force those parties to explain how that information justifies discriminatory arrangements, instead of requiring an aggrieved MVPD to establish a prima facie case on the basis of the limited information available to it.[9]

Third, even if an MVPD succeeds in challenging an unreasonably discriminatory contract between a programmer and an affiliated cable operator in a particular market, an identical contract with another cable operator in another market will continue to produce results which already have been deemed anticompetitive, until the scheme is also attacked in that market.

Ironically, the proposals set forth in the Notice will at best help battle the ills recognized by Congress only if large numbers of alternative MVPD's come forward to challenge individual, although largely identical, discriminatory arrangements between affiliated cable operators and programmers, thus greatly imposing on the Commission's resources by requiring case-by-case adjudications of the reasonableness of those identical contracts.

---

[9]Indeed, the Commission has gone so far as to propose that to establish a prima facie case, a complaint must be based on affidavits or other "tangible evidence." This suggests that the mere fact of discrimination by an affiliated programmer is not enough to satisfy this test, even though that is the precise harm which Congress sought to remedy and even though the victimized MVPD has no access to the details underlying the fact of discrimination. If the Commission decides to implement a complaint procedure along the lines described in the Notice, the prima facie standard should be no different than that used by federal courts: the complaint survives as long as it states a claim upon which relief can be granted. A claim of discrimination against an unaffiliated MVPD, based on specific factual allegations, should satisfy this standard. The MVPD could then gather additional evidence in the discovery process. Sanctions for frivolous complaints, i.e., those for which no factual basis existed at the time of filing, could still be imposed, as they are in the federal courts.

Given its need to preserve resources, the Commission should take a broader approach.

NPCA proposes that the Commission adopt a "rate card" framework that will require affiliated programmers to disclose publicly the terms on which they will distribute programming to any MVPD, regardless of the technology used by the MVPD, its franchised or nonfranchised status, or its affiliation with the programmer. Presumably, each affiliated programmer's rate card would prescribe rates based on the number of subscribers served by the MVPD, i.e., "a graduated pricing structure . . . to facilitate broad program distribution," as suggested in the Notice at paragraph 15. Volume discounts could be established, as could incentives for placing the programming on a particular tier, and any other terms which the programmer desires to include in its contracts with MVPD's, as long as all such terms apply universally to all MVPD's. Discrimination will still exist, but it will be premised on legitimate distinctions between MVPD's, such as the number of subscribers served, the cost of distributing the signal to the MVPD's receive site, tiering, and regional economics. Systematic discrimination solely on the basis of affiliation, franchised status, and technology would be eliminated.

The Commission would simply have to establish the terms on which affiliated programmers could discriminate. Programmers would then issue their individual rate cards. Prior Commission approval of individual rate cards would not be required. However, the burden would be on the affiliated programmer to seek Commission approval of exclusive agreements and other proposed deviations from the rate card in particular contexts. Again, the affiliated entity has its "evidence" and thus is in the best position to explain why its discriminatory or exclusive arrangements are justifiable. The burden should be on them to do so, particularly in light of Congress' expressed desire to eliminate unreasonably discriminatory agreements. Requiring prior Commission approval of exclusive or otherwise discriminatory contracts also prohibits the damage that otherwise would occur during the period in which the MVPD's complaint was resolved by the Commission under the framework proposed in the Notice. A determination that a particular arrangement is unreasonable and invalid is of limited value to the injured MVPD and the public if that determination is not made until several years after the contract is put into effect.[10/]

To the extent there is a justification for discriminating on the basis of affiliation, the programmer could establish the justification in a single administrative proceeding. Then the justifiably discriminatory terms could be made a part of the rate

---

[10/] Prior approval should also be required for program agreements between affiliated entities in which the cable operator has been granted the right to subdistribute the programming to other MVPD's. The Commission could then establish a timetable in which the cable operator would be required to respond to a request for programming by another MVPD. Failure to respond would be deemed a denial, entitling the MVPD to obtain the programming directly from the affiliated programmer. This eliminates the situation of de facto exclusivity described above, in which the programmer refuses to license an unaffiliated MVPD until the affiliated cable operator denies a request, and the affiliated cable operator neither grants nor denies the request, but simply does not respond or ties its response to the grant of rights beyond those the subject of the subdistribution agreement.

card. Under this approach, the Commission would not be burdened with repeated challenges to what in essence would be the same contract. Of course, the Commission could still entertain complaints from MVPD's who claim that the programmer is not following the rate card or that the rate card calls for discrimination against certain MVPD's on other improper grounds.

More importantly, the rate card approach would be more effective in discouraging the discriminatory arrangements that Congress sought to curb. While programmers could, for valid reasons, still refuse to deal with certain MVPD's, the reasons therefore would be known in advance and would be applied with equal force to all MVPD's. Similarly, the imposition of differentials in price and other terms would be based on known, legitimate factors, rather than on unstated or improper factors, such as non-affiliation or the lack of a franchise.

Subdistribution Agreements Should Be
<u>Banned Or Strictly Regulated</u>

As reflected in the anecdotal evidence presented above, franchised operators often obtain the right to subdistribute programming and then exploit those rights to the detriment of SMATV operators. The Commission correctly notes that, <u>in theory</u>, subdistribution agreements need not be anticompetitive, Notice, para. 32, such as when they are used merely as a vehicle for governing the method in which programming will be further distributed in a particular market. In fact, such agreements are used by franchised operators as a means to restrict programming, rather than subdistribute it, or to impose unfair conditions on SMATV operators seeking the rights to the programming. As documented above, one franchised operator "offered" to subdistribute certain popular programming only if the SMATV operator guaranteed an unreasonably high penetration rate, in an attempt to coerce the SMATV operator into selling its right to serve a particular property. In some instances, franchised operators will tie the programming to which they have the subdistribution rights to other programming that the SMATV operator is not interested in purchasing. One NPCA member, who owns both a SMATV system and the apartment complex it serves, was offered subdistribution to the regional sports programmer only on the condition that the local franchised operator be given access to the property. The SMATV operator complained to the holder of the regional sports programmer, who responded that the franchised operator had no right to tie programming to access, but refused to intervene, thus leaving the SMATV operator and its subscribers without the programming they desired.

Subdistribution agreements may have a place in some industries as an efficient means of responding to consumer demand for certain goods or services. In the cable marketplace, however, subdistribution agreements are used to exact unjust concessions from SMATV operators who must either pass increased costs along to its consumers or leave the market entirely. Subdistribution agreements have no benign purpose or effect and should be banned outright. The resulting marketplace would simply permit all MVPD's to buy direct from the programmer under the rate card approach developed above.

To the extent the Commission finds some merit in subdistribution agreements and decides to retain them, certain restrictions must be imposed. A franchised operator with subdistribution rights must be prohibited from tying the programming rights to some other programming, or to a right of access to private property. Subdistribution agreements should require the holder of the rights to subdistribute the programming conditioned only on terms which bear some relation to the subdistribution itself. The rates at which programming may be subdistributed should be regulated to prohibit the exaction of monopoly profits.

A franchised operator with subdistribution rights should be required to give an unconditional response to a request for programming from an MVPD within a set period of time, such as 15 days, to prevent the usual delays which are tantamount to denials.[11/] If a franchised operator with subdistribution rights deems a particular SMATV operator to be too small to justify the costs of subdistribution, or for any reason denies a request for subdistribution, the SMATV operator should be permitted to purchase

---

[11/]Subdistribution agreements often allow for direct sales by the programmer if the holder of the subdistribution rights turns down a request for carriage from another MVPD. Franchised operators with subdistribution rights frustrate such provisions by simply refusing to respond to requests, thus prohibiting a direct request to the programmer.

directly from the programmer according to the terms of its rate card.

The Proposals Set Forth In The Notice Will Not Further Congressional Intent

As indicated above, NPCA believes that the overall framework proposed in the Notice is exactly what the vertically integrated cable industry desires to assist it in perpetuating the discriminatory tactics which have worked so well as to result in congressional action. Some of the flaws contained in the proposed scheme are discussed above. First, unjustifiable discrimination can best be detected and prohibited by rebuttably presuming the invalidity of exclusive contracts and other discriminatory arrangements not applied via a standard rate card adopted interindustries. The Commission errs in suggesting that aggrieved MVPD's prove the unreasonableness of such agreements, since it is not the conduct of the MVPD's which has necessitated congressional and administrative action and since it is the affiliated programmers and the franchised operators who have access to most of the relevant information.

Second, requiring a case-by-case review of discriminatory agreements, as proposed in the Notice, raises the specter of numerous, duplicative complaints to the Commission by various, individual MVPD's. The wastefulness of repeated adjudications is only exacerbated by the fact that the complaints will involve virtually identical contracts used by the same programmers in case after case, market after market.

Apparently, the Commission has given far too much weight to the traditional excuses advanced by the vertically integrated cable interests to justify discriminatory and exclusive arrangements. For example, the supposed increased cost of serving SMATV systems is a transparent excuse, since smaller franchised systems are charged lower rates than larger private systems.

The other oft-invoked justification for exclusivity is that it allows the local cable operator to charge more for its distinct service, and thus is both a reward for helping to fund the development of new programs and an inducement to continue doing so. However, this argument does not hold water. In the examples above where the franchised operator is allowed to charge an exorbitant premium for permitting the SMATV operator to redistribute a particular programming service to which the franchised operator has first rights, it is the franchised operator who pockets the profit, with no requirement of an increased investment in program development. The programmer is paid on a per subscriber basis, even for the SMATV subscribers on whom the franchised operator is making the extra profit. If increased funding of the programmer's endeavors were the real objective, the programmer would sell direct to as many MVPD's as possible, at the highest rates the market would bear. The current practice simply lines the pockets of the franchised operator.

Certain other aspects of the Notice also require Comment. In fn. 13, Notice p. 4, the Commission suggests that there is ambiguity as to the meaning of "multichannel video programming distributor," despite the statutory definition of that term: "a person . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming." In the pending must-carry proceeding, the Commission suggested that this definition could exclude SMATV, even though SMATV "makes available for purchase, by subscribers or customers, multiple channels of video programming." The statutory definition of MVPD clearly includes SMATV. See Comments of NPCA, et al. in MM Docket No. 92-259, FCC 92-499, pp.3-4 (filed Jan. 4, 1993).

These commenters also note a misreading of the 1992 Act which is repeated throughout the Notice. The Notice mistakenly assumes that Section 628(b) requires a showing of "competitive harm" to state a claim under that provision and the rules to be implemented thereunder. Notice, para. 10 ("the precise showing of harm that we should require to meet the statute's threshold requirement is a critical issue at the outset.") However, the statute itself renders unlawful any

> unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing . . . programming to subscribers or customers.

1992 Act, S 628(b).

Thus, the essential elements are i) unfair or deceptive acts by an affiliated programmer, ii) the purpose or effect of which, iii) is to hinder or prevent any MVPD from carrying particular programming. If, under the complaint procedure proposed by the Notice, an aggrieved MVPD proves unfair acts which have prohibited it from carrying particular programming, its case under the statute is made. Nevertheless, the Notice suggests that if an aggrieved MVPD proves the three elements required by the statute, it still has not proven its case, unless it can also prove a fourth element <u>not</u> required by the statute, "competitive harm." These commenters respectfully suggest that if Congress had intended to require a separate showing of "competitive harm," it would have said so. The Commission should not create proof requirements which Congress omitted.

Most likely, Congress recognized the harm inherent in any conduct which fit the statutory description of conduct declared to be illegal. An administratively-created "competitive harm" requirement would simply open the door to proceedings along the lines of civil antitrust litigation with economists and expert witnesses disagreeing as to the relevant criteria. Congress did not pass §628 simply to make the antitrust laws applicable to the cable industry. They already are. More specifically, Congress did not require a showing of "competitive harm" to determine the invalidity of a particular agreement.

In addition, the "competitive harm" requirement proposed by the Commission is inconsistent with the express language of § 628(b). For instance, the statute renders illegal unfair conduct by an affiliated programmer which prohibits "<u>any</u>" MVPD from obtaining programming. Thus, if a particular market were served by

20 MVPD's each with a 5% share, unfair conduct by an affiliated programmer which prohibited a single MVPD from obtaining programming is illegal under the statute, even if the 5% market share represented by that MVPD would be statistically insignificant in the eyes of the economists and other experts which the Commission apparently wishes to hear from under its approach to resolving complaints.[12]

Moreover, the statute's use of the disjunctive "or" between "purpose" and "effect" shows that Congress meant to outlaw certain acts, the purpose of which is to prohibit an MVPD from carrying programming, even if the acts do not have that effect. Since the invalidity of an agreement can be proven by the mere intent of the actors, without regard to the result, no actual harm must ensue to state a claim under the statute.[13]

NPCA is also perplexed by the suggestion that MVPD's who purchase programming through buying groups might be subject to joint and several liability in order to claim the benefits of § 628(b)(2)(B). Buying groups were specifically included in the

---

[12] In response to fn. 27, NPCA submits that unlawful discrimination may occur, even in the absence of "harm to consumers as measured by the availability o[12]f, or amount of, programming in the relevant market?" Price differentials will cause harm to consumers in the form of unreasonably high programming rates, even though the programming may remain available.

[13] For these reasons, the third specific option proposed by the Commission for dealing with discriminatory pricing, Notice, para. 22, largely undercuts congressional intent. As noted above, simply applying antitrust standards to discriminatory arrangements means that § 628(b) has done nothing but to require the Commission to become an expert on antitrust law, and to shift antitrust litigation from the courts to the Commission.

enumeration of entities who were entitled to the benefits of that provision, along with franchised cable operators and other MVPDs. The statute creates no basis from which to infer that Congress meant that buying groups should be treated differently than the other entities on the list. To the contrary, the very purpose of the statute was to institute uniform treatment of all such entities. The suggestion that a small MVPD who purchases its programming from one of the large buying groups should be liable for the defaults of every other member of the buying group is the surest way of eliminating the small MVPD from the market, and transferring their business to the entrenched franchised operator.

With respect to exclusive contracts which prohibit an MVPD from obtaining programming from an affiliated programmer, the Commission notes that the statute requires it to prevent such arrangements in geographical areas "served by a cable operator," unless the exclusive contract is found to be in the public interest. Section 628(c)(2)(D). In areas not served by a cable operator, the statute requires the Commission to prohibit such arrangements, without reference to a public interest determination. Section 628(c)(2)(C). The Notice then states: "We seek comment on whether the lack of reference to the public interest . . . for contracts in areas 'not served by a cable operator' means that Section 628(c)(2)(C) makes exclusive contracts in such areas a per se violation." Notice, para. 28.

A per se rule in such situations is clearly mandated by the plain language of the statute. If Congress had meant such